BEFORE THE

Federal Communications Commission

WASHINGTON, DC

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") hereby files its Reply Comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

In these Reply Comments, TCI focuses on Section 301(e) of the Telecommunications Act of 1996 ("1996 Act")[2] which broadly prohibits state and local regulation of technical standards, customer equipment, and transmission technologies. A small number of local franchising authorities ("LFAs") attempt to limit the scope of Section 301(e) by asserting that they retain power to regulate

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[1] In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking, CS Docket No. 96-85, Commission 96-154 (released April 9, 1996)("Notice").

[2] Pub.L.No. 104-104, 100 Stat. 56, approved Feb. 8, 1996.

technical standards, customer equipment, and transmission technology pursuant to their franchising powers. Such an interpretation is inconsistent with the plain language of Section 301(e) and past interpretations of LFAs' franchising powers. Moreover, it makes no sense -- Congress could not have intended to take these powers away from LFAs in one section of the Act, only to have LFAs exercise the very same powers under a different section of the Act. Rather, Congress recognized that eliminating piecemeal local regulation of technical standards, customer equipment, and transmission technology was necessary to promote the deployment of advanced telecommunications technologies.

II. CONGRESS UNEQUIVOCALLY PROHIBITED ANY STATE OR LOCAL REGULATION IN THE AREAS OF TECHNICAL STANDARDS, CUSTOMER EQUIPMENT, AND TRANSMISSION TECHNOLOGY.

Section 301(e) of the 1996 Act unequivocally prohibits state and local authorities from establishing or enforcing technical standards or otherwise regulating a cable operator's use of customer equipment and transmission technology. It does so in two ways. First, Congress deleted the following language from the Communications Act:

> A franchising authority may require as part of the franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection.[3]

[3] 47 U.S.C. § 544(e)(1995), amended by 1996 Act, § 301(e).

Second, Congress replaced the deleted language with a broad statement that "[n]o state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."[4] By adding this language and repealing LFAs' previous authority to enforce technical standards, Congress was effecting a single goal: to flatly "prohibit[] States or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies."[5] As Congress stated:

> The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.[6]

Nonetheless, several LFAs argue that Section 301(e) does not limit an LFA's ability to (1) establish technical standards that exceed the federal requirements, either through the franchising process or through a petition for waiver at the Commission,[7] (2) enforce the federal technical standards through random or periodic inspections and other

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[4] 1996 Act, § 301(e).

[5] See H.R. Rep. No. 204, 104th Cong., 1st Sess. 110 (1995)("House Report").

[6] Id.

[7] See, e.g., Comments of the City of Indianapolis at 4 (stating that LFAs should retain the authority to negotiate technical standards with their operators).

enforcement measures,[8] and (3) dictate or otherwise regulate technical standards, customer equipment, and transmission technologies as part of the franchising process.[9] These LFAs assert that the franchise and franchise renewal provisions in Sections 621 and 626 effectively reinstate the authority eliminated by Section 301(e).[10]

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[8] See, e.g., Comments of Kramer Monroe and Wyatt ("KMW") at 3 (arguing that the restrictions on LFAs contained in Section 301(e) do not alter LFAs' authority to enforce technical standards); Comments of the City and County of Denver at 14 (LFAs must be able to enforce federal standards at the local level); Comments of the Greater Metro Cable Consortium at 7 (same).

[9] See, e.g., Comments of the State of New York Department of Public Service ("NYDPS") at 25. See also Comments of the City and County of Denver at 14. Notwithstanding their comments in this proceeding, the City and County of Denver are part of the Greater Metro Cable Consortium ("GMCC") which recently concluded negotiations on a uniform franchise agreement for the Denver metropolitan area that requires an upgrade to 550 Mhz, but contains no other technical transmission or design parameters, or any design architecture requirements. Thus, the GMCC agreement is consistent with the comments of other LFAs who found no conflict between the broad prohibitions in Section 301(e) and the franchising powers of Sections 621 and 626. See, e.g., Comments of the Massachusetts Cable Television Commission at 10 (the restrictions of Section 301(e) will not have a meaningful affect on the license franchising, renewal or transfer process because most LFAs make only minimal technical requirements which are rarely triggered).

[10] At least one commenter also attempts to limit the scope of Section 301(e) by arguing that Congress' use of the term "transmission technologies" in Section 301(e) refers only to the cable operator's choice of whether to transmit its service by PCS, MMDS, DBS, other methods. KMW Comments at 4 ("transmission technology" relates to broad categories of methods of delivering service such as PCS, MMDS, DBS, OVS, etc.). Thus, according to this commenter, LFAs remain free to dictate the more detailed aspects of how cable infrastructure is deployed. Aside from being inconsistent with the clear language and intent of Congress, this interpretation is patently flawed. The choice of whether an

In effect, the LFAs assert that Congress intended with Section 301(e) to remove LFA powers relating to technical standards, customer equipment, and transmission technology, only to allow LFAs to exercise those same powers under a different provision of the Act. Such an interpretation makes no sense and would impermissibly "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other."[11]

The LFAs seek to use the franchising provisions of Sections 621 and 626 to impose detailed and burdensome technical requirements and regulations on cable operators. Such franchise conditions would not only restrict the use of equipment and transmission technologies, but would also result in de facto technical standards being imposed on the cable operator. Thus, if Section 301(e)'s clear

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operator uses PCS, MMDS, DBS, OVS or any other means of transmission is essentially the choice of whether or not to become a cable operator or a non-cable provider of video programming. This choice is one which: (1) LFAs have never had the power to regulate; and (2) determines whether a video programming provider is subject to any form of LFA regulation. Such an interpretation would impermissibly render the statutory language both nonsensical and meaningless. See, e.g., Consolidated Rail Corp. v. United States, 896 F.2d 574, 579 (D.C. Cir. 1990)("effect must be given, if possible, to every word, clause and sentence of a statute ... so that no part will be inoperative or superfluous, void or insignificant.")(citation omitted).

[11] Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 489 (1947). See also Weinberger v. Hynson, 412 U.S. 609, 631 (1973) (holding that an act of Congress could not be construed so as to promote in one provision what it seeks to prohibit in another).

prohibitions on LFA regulation of equipment, transmission technologies, and technical standards are to have any effect, they must apply to the franchising process. Allowing LFAs to continue dictating a cable operator's use of equipment and transmission technologies through the franchising process would impermissibly render Section 301(e) meaningless.[12]

Moreover, the provision Congress deleted from Section 624 was the LFAs' sole previous authority to enforce or establish technical standards under the Communications Act, including any such authority through the franchising, renewal, or transfer process.[13] Sections 621 and 626 do not grant LFAs any independent power to regulate in the areas of

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[12] It is an established rule of statutory construction that the Commission may not interpret a statute such that one provision is rendered trivial, inoperative, or ineffective. See Mountain States Telephone and Telegraph v. Pueblo of Santa Ana, 472 U.S. 237, 250 (1985); Consolidated Rail Corp. v. United States, 896 F.2d at 579. Rather, Section 301(e) must be construed in a manner which gives effect to all its prohibitions. See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S.Ct. 1529 (1996) (a reading of the statute which gives meaning to all its provisions must prevail over an interpretation which ignores statutory language). To the extent there is an irreconcilable conflict, the newer, more specific prohibitions of Section 301(e) must prevail over any general powers found in Sections 621 and 626. See Callahan v. United States, 122 F.2d 216, 218 (D.C. Cir. 1941) ("[o]lder general language cannot be allowed to overrule newer specific language").

[13] In the Notice, the Commission recognizes that outside Section 624 and the franchising process, LFAs have no express authority to impose technical standards under the Communications Act. Notice at ¶ 104.

technical standards, customer equipment, and transmission technologies. Rather, both the Commission and the federal courts have agreed that LFAs are only authorized to enforce technical standards to the extent permitted by Section 624.[14] By eliminating the only language which had previously authorized LFA establishment and enforcement of technical standards, Congress expressly prohibited LFAs from such regulation.[15] This interpretation is particularly compelling, of course, because Congress coupled elimination of this provision with a specific prohibition on LFA regulation in the area of technical standards, customer equipment, and transmission technology.

While the State of New York notes that Section 624(b) also allows LFAs to "establish requirements for services and

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[14] See, e.g., City of New York v. F.C.C., 814 F.2d 720 (D.C. Cir. 1987), aff'd. 486 U.S. 57 (1988)(agreeing that the franchise powers of Sections 621 and 626 only allowed the LFAs to regulate in a manner consistent with the Section 624 restrictions).

[15] When the wording of an amended statute differs in substance from the wording of the statute prior to amendment, it is an accepted canon of statutory construction that Congress intended the amended statute to effect a change in legal rights. See, e.g., Stone v. Immigration and Naturalization Service, 115 S.Ct. 1537 (1995); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). See also United States v. Ron Pair Enterprises, 489 U.S. 235, 242 (1989); 1A Sutherland Statutory Construction § 22.30 (1993) ("[T]he legislature is presumed to know the prior construction of terms in the original act, and an amendment substituting a new term or phrase for one previously construed indicates that ... a different interpretation should be given the new term or phrase. Thus, ... there is a presumption of change in legal rights").

facilities" in granting or renewing a franchise,[16] this provision (like Sections 621 and 626) never has been interpreted as empowering LFAs to regulate technical decisions regarding equipment and transmission technologies. Rather, as the Commission has stated, "section 624(b) only grants franchisors authority to specify generically the composition and configuration of the cable system ... and not the technical parameters of the cable signal."[17] Thus, Section 624(b) allows the LFA, for example, to require that a cable operator provide certain services or facilities (such as a minimum channel capacity) but does not empower an LFA to dictate the specific technical means by which the cable operator meets such generic requirements.

Finally, allowing LFAs to continue intrusive and burdensome regulation of cable operators' technical decisions would undermine the 1996 Act. The entire thrust of the Act is to remove state and local regulators from an operator's technological decisions because "investment and deployment of existing and future advanced, multipurpose technologies will best be fostered by minimizing government limitations on the commercial use of those technologies."[18] In doing so, Congress foresaw a "national policy framework

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[16] NYDPS Comments at 18-19.

[17] City of New York v. F.C.C., 814 F.2d at 725, n. 5 (emphasis added), aff'd 486 U.S. 57 (1988).

[18] S. 652, 104th Cong., 1st Sess. § 3(5) (1995).

designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies."[19] Limiting the scope of Section 301(e) would be antithetical to this purpose.

CONCLUSION

TCI urges the Commission to make clear in its Order that Section 301(e) precludes states and local governments from regulating in the areas of technical standards, customer equipment, and transmission technologies.

Respectfully submitted,

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[19] Conference Report at 1.